

Issues: Group II Written Notice (failure to follow policy) and Group III with Termination (falsifying documents); Hearing Date: 09/09/13; Decision Issued: 09/10/13; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No.10141; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10141

Hearing Date: September 9, 2013
Decision Issued: September 10, 2013

PROCEDURAL HISTORY

On May 16, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsification of State documents. On May 16, 2013, Grievant was issued a Group II Written Notice for violation of policy.

On June 12, 2013, Grievant timely filed a grievance to challenge the Agency's actions. The matter proceeded to hearing. On July 29, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this case due to the unavailability of an Agency witness. On September 9, 2013, a hearing was held at the Agency's office. Grievant did not appear at the hearing.

APPEARANCES

Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Juvenile Justice employed Grievant as a Juvenile Correctional Officer at one of its facilities. He was responsible for supervising residents at the Facility. No prior disciplinary action was presented during the hearing.

On April 14, 2013, Grievant was working the night shift in the Unit. The night shift began at 5:45 p.m. and ended at 6:15 a.m. He was required to make visual checks of all residents every 15 minutes. He was required to write on Isolation Sheets what he observed. Grievant failed to make his required checks. Even though he had not observed the residents, he wrote "Appears Asleep" on the Isolation Sheets to represent what he claimed to have observed. In addition, Grievant wrote in the log book "16 residents counted." He made that entry 17 times. Grievant had not counted the residents any of those times.

On April 18, 2013, the Major and Captain met with Grievant to discuss possible discipline against Grievant.

On April 26, 2013, Grievant was working the night shift. He was responsible for supervising residents. Checks for residents were supposed to be done every 15 minutes. On April 27, 2013, Grievant conducted a check at 3:05 a.m. and then at 3:51 a.m. His next observation was at 4:15 a.m.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”¹ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Institutional Operating Procedures 207 governed Physical Count Procedures. Section 207-3.3 states, “Informal Count refers to counts required to be made every fifteen (15) minutes by the officer on duty in the unit. The officer must see the skin of each ward being counted.”

“[F]alsification of records” is a Group III offense.² Falsification is not defined by the Standards of Conduct but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of “Falsify” found in Blacks Law Dictionary (6th Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer’s interpretation is also consistent with the New Webster’s Dictionary and Thesaurus which defines “falsify” as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

Isolation Sheets and log books are official State documents. Grievant wrote that he observed residents sleeping at specific times even though he had not actually observed the residents. He wrote in the log book that he had counted residents 17 times even though he had not counted any residents. Grievant knew that he had not actually counted residents when he completed the Isolation Sheets and log book. The Agency has presented sufficient evidence to support the issuance of a Group III Written notice for falsification of State documents. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

Failure to comply with written policy is a Group II offense.³ IOP 207 required Grievant to check residents every 15 minutes. On April 27, 2013, Grievant made a check at 3:05 a.m. but made his next check 47 minutes later. Grievant failed to comply with IOP 207 thereby justifying the issuance of a Group II Written Notice.⁴

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management”⁵ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**. The Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management

³ See, Attachment A, DHRM Policy 1.60.

⁴ Because Grievant did not appear at the hearing, the Hearing Officer cannot determine the reason for the delay.

⁵ *Va. Code § 2.2-3005*.

101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁶

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.